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Supreme Court, U.S.
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No. ____

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In The Supreme Court of the United States

SPRINT SPECTRUM L.P. d/b/a SPRINT PCS GROUP and SPRINTCOM, INC., d/b/a SPRINT PCS GROUP,

Petitioners,

v.

JESSICA HALL, individually and on behalf of others similarly situated,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Due Process Clause of the Fourteenth Amendment, as applied in Phillips Petroleum v. Shutts, 472 U.S. 797 (1985), preclude the certification of a class by an Illinois court which will apply Kansas statutory law to the claims of residents from 48 states, where the Kansas statute has no extraterritorial reach?

2. Does an Illinois court's certification of a 48-state class under Kansas statutory law violate principles of Federalism where the class-members from 47 states have minimal contacts with Kansas, and the Kansas statute does not extend beyond the borders of Kansas?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioner Sprint Spectrum L.P. is an entity indirectly but solely owned by Sprint Nextel Corporation, a publicly held Kansas corporation with its principal place of business in Virginia. Petitioner SprintCom, Inc. is an entity indirectly but solely owned by Sprint Nextel Corporation, a publicly held Kansas corporation with its principal place of business in Virginia.

Respondent

Respondent Jessica Hall is an individual and has no corporate affiliations.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES vi

OPINIONS AND ORDERS BELOW 1

BASIS FOR JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 9

I. Phillips Petroleum v. Shutts Precludes the Application of Kansas Statutory Law to the Claims of Non-Kansas Residents 10

II. The Illinois Court's Failure to Follow Phillips Petroleum v. Shutts Violates the Due Process Clause and Principles of Federalism. 12

III. This Case Presents Important Constitutional Questions that Require Resolution by this Court 14

CONCLUSION 16

APPENDIX

Order of
The Circuit Court for the
Third Judicial Circuit,
Madison County, Illinois
Re: Granting Plaintiff's Motion for
Class Certification,
Case No. 04-L-113,
entered May 20, 2005 ..... 1a

Order of
The Appellate Court of Illinois for the
Fifth Judicial District
Re: Affirming the Circuit Court's Order of
May 20, 2005,
Case No. 5-05-0354,
entered June 27, 2007 ..... 16a

Order of
The Appellate Court of Illinois for the
Fifth Judicial District
Re: Denying Sprint's Rule 367
Petition for Rehearing or,
in the Alternative, Rule 316
Application for Certificate of Importance,
Case No. 5-05-0354,
entered August 8, 2007 ..... 38a

Order of
The Supreme Court of Illinois
Re: Denying Sprint's Petition for
Leave to Appeal,
Case No. 105309,
entered February 4, 2008 ..... 39a

Order of
The Supreme Court of Illinois
Re: Denying Sprint's Motion for
Leave to File Motion to
Reconsider Denial of Petition for
Leave to Appeal,
Case No. 105309,
entered February 28, 2008 ..... 40a

TABLE OF AUTHORITIES

CASES **Page(s)**

Allstate Ins. Co. v. Hague,
449 U.S. 302 (1981) 10

BMW of N. Am. v. Gore,
517 U.S. 559 (1996) 13

Dragon v. Vanguard Industries, Inc.,
89 P.3d 908 (Kan. 2004) 11

Franchise Tax Bd. v. Hyatt,
538 U.S. 488 (2003) 11

Hall v. Sprint Spectrum, L.P.,
876 N.E.2d 1036 (Ill. App. 2007) 1, 6, 7

Hall v. Sprint Spectrum, L.P.,
882 N.E.2d 77 (Ill. 2008) 1, 8

Head v. Platte County, Missouri,
749 P.2d 6 (Kan. 1988) 5

Montgomery v. Sprint Spectrum, L.P.,
No 07-2227-JTM, 2007 U.S. Dist. LEXIS 82608 (D. Kan. Nov. 6, 2007) 5

Phillips Petroleum v. Shutts,
472 U.S. 797 (1985) ..... passim

State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003) 11, 13

CONSTITUTIONAL PROVISION

U.S. CONST. amend. XIV ..... passim

STATUTES

28 U.S.C. § 1257(a) 2

Kan. Stat. Ann. § 50-623 et seq. (2006) 4

Kan. Stat. Ann. § 50-624(c) (2006) 3, 5, 9

Kan. Stat. Ann. § 50-626(a) (2006) 5

Kan. Stat. Ann. § 50-627(a) (2006) 5

Kan. Stat. Ann. § 50-638(a) (2006) 5

OTHER AUTHORITIES

Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992) 16

Scott Fruehwald, *Constitutional Constraints on State Choice of Law*, 24 DAYTON L. REV. 39 (1998) 15

Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973 (2002) 15

Victor E. Schwartz & Leah Lorber, *State Farm v. Avery: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215 (2001).....13, 15

OPINIONS AND ORDERS BELOW

The May 20, 2005 Order granting Class Certification, entered by the Circuit Court for the Third Judicial Circuit, Madison County, Illinois, is set forth in the Appendix attached hereto (App. at 1a-15a).

The June 27, 2007 Opinion of the Appellate Court of Illinois for the Fifth Judicial District affirming the Circuit Court's Order of May 20, 2005 is reported at Hall v. Sprint Spectrum, L.P., 876 N.E.2d 1036 (Ill. App. 2007), and is set forth in the Appendix attached hereto (App. at 16a-37a).

The August 8, 2007 Order of the Appellate Court of Illinois for the Fifth Judicial District denying Sprint's Rule 367 Petition for Rehearing or, in the Alternative, Rule 316 Application for Certificate of Importance is reported at Hall v. Sprint Spectrum, L.P., 876 N.E.2d 1036 (Ill. App. 2007), and is set forth in the Appendix hereto (App. at 38a).

The February 4, 2008 Order entered by the Supreme Court of Illinois denying Sprint's Petition for Leave to Appeal is reported at Hall v. Sprint Spectrum, L.P., 882 N.E.2d 77 (Ill. 2008), and is set forth in the Appendix attached hereto (App. at 39a).

The February 28, 2008 Order entered by the Supreme Court of Illinois denying Sprint's Motion for Leave to File Motion to Reconsider Denial of Petition for Leave to Appeal is set forth in the Appendix attached hereto (App. at 40a-41a).

BASIS FOR JURISDICTION

The judgment of the Appellate Court of Illinois was rendered on June 27, 2007. App. at 16a. The order of the Supreme Court of Illinois denying Sprint's Petition for Leave to Appeal was entered on February 4, 2008. App. at 39a. The order of the Supreme Court of Illinois denying Sprint's Motion for Leave to File Motion to Reconsider Denial of Petition for Leave to Appeal was entered on February 28, 2008. App. at 40a. This petition for a writ of certiorari is filed within 90 days from the date of entry of the denial of Sprint's Petition for Leave to Appeal by the Supreme Court of Illinois. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Kansas Consumer Protection Act, Kan. Stat. Ann. § 50-624(c) (2006), states in relevant part:

> 'Consumer transaction' means a sale, lease, assignment or other disposition for value of property or services within this state (except insurance contracts regulated under state law) to a consumer; or a solicitation by a supplier with respect to any of these dispositions.

STATEMENT OF THE CASE

Respondent Jessica Hall, a resident of Illinois, filed a nationwide class action in the Circuit Court of Madison County, Illinois, alleging that the "Early Termination Fee" ("ETF") provisions in contracts between Petitioners Sprint Spectrum L.P. and SprintCom, Inc. ("Sprint") and 16 million of its wireless customers all over the United States were illegal penalties which violated the Kansas Consumer Protection Act, Kan. Stat. Ann. § 50-623 et seq. (2006). Ms. Hall sought to represent the interests of 16 million Sprint customers in 48 states by applying the statutory law of Kansas.

Under Sprint's term contracts, which last 12 or 24 months, a wireless customer agrees to pay an ETF of $150 if the customer terminates the contract before the end of the agreed term. The assurance of a term contract allows Sprint to provide substantial "up front" subsidies to a customer in the form of wireless handsets sold at deeply discounted prices, and lower monthly per-minute usage rates. In exchange, the customer agrees to remain with Sprint throughout the 12 or 24 month term, or to pay Sprint an ETF as partial compensation for the substantial losses Sprint suffers if the customer breaches and terminates the contract early. For competitive reasons, all major providers of wireless service in the United States charge ETFs comparable to those charged by Sprint. Thus, ETFs impact more than 100 million cell-phone users throughout the country.

The Kansas Consumer Protection Act applies only to consumer transactions which occur "within this state," Kan. Stat. Ann. §§ 50-624(c), 626(a), 627(a), 638(a) (2006), and the statute has no extraterritorial application outside the State of Kansas. Head v. Platte County, Missouri, 749 P.2d 6, 7 (Kan. 1988) ("a state is sovereign only within its own boundaries and its laws have no extraterritorial force"). See also Montgomery v. Sprint Spectrum, L.P., No 07-2227-JTM, 2007 U.S. Dist. LEXIS 82608, at *16-*17 (D. Kan. Nov. 6, 2007) (Kansas Consumer Protection Act claim dismissed because "the KCPA applies to consumer transactions which occur 'within this state'" and "[t]he KCPA is not intended to serve as a nationwide basis for liability against Kansas companies, based solely upon their presence in this state, when the actual consumer transaction does not occur here").

Ms. Hall's consumer transaction with Sprint occurred within the State of Illinois, not Kansas. Nevertheless, the trial court in Illinois certified a 48-state class under the Kansas Consumer Protection Act, with Ms. Hall serving as the class representative. See App. at 1a. The theory for applying internal Kansas statutory law to residents who engaged in transactions in 47 other states was that the contract Ms. Hall signed in Illinois stated that Kansas law would apply to the contract. The choice of law clause, however, did not cite or refer to the Kansas Consumer Protection Act. Both on its face and as construed by courts in Kansas, this statute does not apply unless the consumer transaction occurred within the State of Kansas.

In the trial court, Sprint argued that an Illinois court may not certify a 48-state class under internal Kansas statutory law when the vast majority of classmembers had no contact with the State of Kansas. The Illinois court, however, ignored the requirements of Phillips Petroleum v. Shutts, 472 U.S. 797, 818 (1985), that the application of one state's law to the claims of residents from many other states may be "neither arbitrary nor fundamentally unfair." In its May 20, 2005 Order granting class certification, the trial court certified a 48-state class under Kansas statutory law without mentioning Shutts.

Sprint appealed to the Appellate Court of Illinois. Among other things, Sprint argued that the choice-of-law provision contained in the contract ("This agreement is governed by and must be construed under federal law and the laws of the State of Kansas") applies only to claims that seek to enforce the terms of the contract, and may not be construed to govern extra-contractual statutory claims which arise under a statute that has no extraterritorial reach beyond the State of Kansas. Sprint also argued that Phillips Petroleum v. Shutts and the Fourteenth Amendment's Due Process Clause precluded the application of Kansas statutory law to nearly 16 million non-Kansas residents. Sprint noted that the trial court failed to analyze the due process implications of the application of internal Kansas statutory law to non-Kansas classmembers in 47 other states. See Hall v. Sprint Spectrum, L.P., 876 N.E.2d 1036, 1044 (Ill. App. 2007) ("Sprint next argues that applying the Kansas Consumer Protection Act to non-Kansas class

members would violate their due process rights under Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985).").

Despite these arguments, the Appellate Court of Illinois misconstrued Shutts when it affirmed the 48-state class certification order under the Kansas Consumer Protection Act:

> Because Sprint's form contract contained an express choice-of-law provision, the class members had reason to anticipate that Kansas law would govern their consumer fraud claim. Accordingly, enforcing the express choice-of-law provision is consistent with fulfilling the expectations of the parties and is not arbitrary or unfair... As long as the law chosen in the contract satisfies the "substantial relationship to the parties or the transaction" test, as it does in this case, enforcing it will not violate due process.

Hall v. Sprint Spectrum, L.P., 876 N.E.2d 1036, 1044 (Ill. App. 2007). The Appellate Court did not address Sprint's argument that the contractual choice-of-law provision does not apply to extra-contractual statutory claims, or Sprint's argument that the Kansas statute applies only to consumer transactions "within this state" of Kansas, and that the statute has no extraterritorial reach.

Sprint sought leave to appeal to the Supreme Court of Illinois and relied on the Due Process Clause of the Fourteenth Amendment, this Court's decision in Shutts, the express language of the Kansas statute, and the decisions of the Kansas courts that Kansas statutes may not be applied extraterritorially. Sprint argued that if the Kansas Consumer Protection Act were applied to the claims of all of the classmembers from 48 states, then both Ms. Hall and every other resident from every state except Kansas will lose their statutory fraud cases because a necessary element under the Kansas Consumer Protection Act is that the consumer transaction occur "within this state." As a result, the courts of Illinois would deprive consumers from 47 states of their rights under the Due Process Clause as applied in Phillips Petroleum v. Shutts, 472 U.S. 797 (1985), and under the principles of Federalism and state sovereignty which are the bedrock of our form of government.

Notwithstanding Sprint's arguments, the Supreme Court of Illinois entered an order denying Sprint's Petition for Leave to Appeal on February 4, 2008. Hall v. Sprint Spectrum, L.P., 882 N.E.2d 77 (Ill. 2008); App. at 39a. As a result, the claims of residents of 47 states outside of Kansas will be adjudicated in Illinois under a statute which does not apply outside of Kansas. Not only does certification of this class threaten the due process rights of millions of individual litigants, but it also unsettles legitimate business expectations around the country that a state has power to act only within its own borders. Given the magnitude and frequency of nationwide class certification rulings, review by

this Court is imperative to uphold the Fourteenth Amendment's Due Process Clause and vital principles of Federalism.

REASONS FOR GRANTING THE WRIT

We have a system of Federalism which permits each of the 50 states to adopt its own laws, and precludes each of the 50 states from legislating beyond its own borders. The Due Process Clause, as construed in Shutts, does not permit a single state's law to be applied to residents from numerous other states absent extenuating circumstances. This case demonstrates why Federalism and the Due Process Clause must be honored here to protect the rights of some 16 million residents from 47 states.

Ms. Hall wishes to represent the interests of all Sprint customers who were charged an ETF, no matter which state they resided in when they entered into their consumer transactions. If that were permitted, Ms. Hall of Illinois would represent customers who signed their Sprint contracts in, for example, Maine, New Mexico, Georgia, and Oregon. Yet by definition, all of those people (as well as those from 43 other states) will lose their cases against Sprint because none of them engaged in a consumer transaction "within this state" of Kansas, Kan. Stat. Ann. § 50-624(c). Therefore, the Kansas Consumer Protection Act provides no relief for any of these people, and their claims will be dismissed. Indeed, their purported claims against Sprint relating to the ETF will not only fail under the Kansas Consumer Protection Act, but the case in Illinois will be res judicata of any

other claims they might have against Sprint under the laws of their own states relating to the ETF. This is a clear abridgement of these classmembers' due process rights under Shutts and its progeny, and an encroachment into the rights of 47 sovereign states.

I. Phillips Petroleum v. Shutts Precludes the Application of Kansas Statutory Law to the Claims of Non-Kansas Residents.

In Philips Petroleum v. Shutts, 472 U.S. 797 (1985), this Court rejected the application of Kansas law to non-Kansas residents because of the lack of interest that the State of Kansas had in their claims. In determining whether Kansas law could be applied to claims of residents from multiple other states, the Court stated:

> Kansas must have a "significant contact or significant aggregation of contacts" to the claims asserted by each member of the plaintiff class, contacts "creating state interests" in order to ensure that the choice of Kansas law is not arbitrary.

Shutts, 472 U.S. at 821 (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981)). The Court went on to hold that application of Kansas law to non-residents would be "sufficiently arbitrary and unfair as to exceed constitutional limits" imposed by the Due Process Clause of the Fourteenth Amendment. Shutts, 472 U.S. at 822.

Since its decision in Shutts, this Court has reaffirmed the importance of the constitutional limits on a state's ability to adjudicate conduct that occurred outside of its borders. In State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003), the Court noted that a state does not have a "legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." Again in Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 494-95 (2003), the Court recognized the importance of the application of state law in a "constitutionally permissible manner." Applying Shutts, the Court held that a Nevada court permissibly selected the application of Nevada law because "contacts are manifest in this case: the plaintiff claims to have suffered injury in Nevada while a resident there; and it is undisputed that at least some of the conduct alleged to be tortious occurred in Nevada." Id. It would not have been permissible, however, to apply the law of Minnesota to control conduct which occurred in the State of Nevada.

The Kansas Supreme Court has followed Shutts in determining the appropriateness of applying Kansas law to nationwide classes. In Dragon v. Vanguard Industries, Inc., 89 P.3d 908 (Kan. 2004), that court reversed and remanded the certification of a nationwide class, stating that the lower court had not properly analyzed the due process issue. Citing Shutts, the court held that "full faith and credit and due process issues prevent Kansas from constitutionally applying its own substantive law to every claim . . ." Id. at 918. While the courts of Kansas have understood the due

process limitations upon the power of a single state acting within a 50-state system, the courts of Illinois have not. The anomaly is striking: a Kansas court would not apply the Kansas Consumer Protection Act to residents from 47 other states, but an Illinois court has done so without hesitation.

In Shutts, the Court recognized that principles of due process preclude a state from using the class action vehicle to impose its own policies on a class of plaintiffs from many other jurisdictions without substantial justification. 472 U.S. at 823 ("constitutional limitations...must be respected even in a nationwide class action"). In clear contravention of Shutts, here an Illinois court intends to apply a Kansas statute that does not stretch beyond the borders of Kansas to classmembers from 48 states. In ruling this way, the Illinois court disregarded the import of Shutts and the limitations placed on individual sovereign states by the Due Process Clause.

II. The Illinois Court's Failure to Follow Phillips Petroleum v. Shutts Violates the Due Process Clause and Principles of Federalism.

In the wake of its decision in Shutts, this Court has recognized the central role that principles of state sovereignty play in determining whether a state's application of law to classmembers from many other states violates principles of Federalism. The Court has made clear that there are constitutional limitations on any one state's ability to impose policies on citizens of another state:

> A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.

State Farm, 538 U.S. at 422 (2003). See also BMW of N. Am. v. Gore, 517 U.S. 559, 572 (1996) ("principles of state sovereignty and comity" prevent a state from "infringing on the policy choices of other States"). Yet here, an Illinois court intends to apply the internal statutory law of the State of Kansas to conduct which occurred in 47 other states. This would eviscerate principles of state sovereignty, comity, and Federalism. See Victor E. Schwartz & Leah Lorber, *State Farm v. Avery: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215, 1215-19 (2001) (concluding that the practice of state courts to ignore the policy decisions of legislatures "interferes with the lawmaking functions of Congress and state legislatures, upsets the fundamentals of our democratic system, and raises acute federalism concerns").

The text of the Kansas statute ("within this state") explicitly prohibits even a Kansas court from applying its statute to consumer transactions that did not occur in Kansas. Yet here, an Illinois court seeks to do what even a state court in Kansas

could not do by applying the statute outside the borders of Kansas. If a court sitting in the state where the law was passed is prohibited from applying the statute extraterritorially, then clearly a state court outside of Kansas is likewise barred. The Illinois court's decision to certify a 48-state class under Kansas internal and non-extraterritorial statutory law tramples upon the due process rights of the vast majority of the 16 million classmembers, because the claims of all non-Kansas residents will be barred under the Kansas statute.

The decision of the Illinois court shows little regard for the principles of Federalism that are implicated every time a nationwide class is certified. Just as one state legislature cannot act as a super-legislature to impose its own policies on citizens of another state, the courts of Illinois cannot impose the statutory policies of Kansas on 16 million classmembers from 48 states. The certification of such a class violates the Due Process Clause and principles of Federalism that this Court has repeatedly recognized are central constitutional considerations.

III. This Case Presents Important Constitutional Questions that Require Resolution by this Court.

Sprint urges this Court to grant the writ because the decision of the Appellate Court of Illinois has serious and negative implications for all purported nationwide class actions. The class action vehicle, when employed properly, can be an efficient means for resolving large disputes. As demonstrated

by this case, however, the class form can be abused so that a single state court may violate the rights of millions of classmembers with a single ruling.

By failing to apply the protections of the Due Process Clause recognized by this Court in Shutts, the Appellate Court of Illinois has violated the due process rights of 16 million classmembers in an industry where 100 million people could well be impacted. The ripple effect in courts across the country may well be significant. It is unfortunate, but true, that this Court's teachings that due process, comity, and Federalism constrain the power of one state out of 50 have been more honored in the breach than the observance.

Legal commentators and academics nationwide have engaged in discourse and debate over the very constitutional issues presented by this case. See, e.g, Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 993 (2002) (highlighting the Court's approach to "articulated due process limits on the assertion of jurisdiction in civil cases" and noting "judicial skepticism about the propriety of wholly extraterritorial regulation"); Victor E. Schwartz & Leah Lorber, *State Farm v. Avery: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215, 1215-19 (2001) (noting the "growing trend of courts usurping the role of elected lawmakers in their own states and around the country"); Scott Fruehwald, *Constitutional Constraints on State Choice of Law*, 24 DAYTON L. REV. 39, 40-41 (1998) (advocating for stricter application of the constitutional constraints of the

Due Process Clause and the Full Faith and Credit Clause in order "to overcome the confusion in American choice of law and to protect individual liberty and state sovereignty"); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 250 (1992) (discussing the error of modern choice of law scholarship "to ignore the constitutional principles that control choice-of-law questions"). The arguments and concerns of these sophisticated observers reflect the pressing need for this Court to address and resolve the issues presented by this writ.

If the Court does not address this usurpation of power by an Illinois state court, it may well result in courts around the country exploiting the class action vehicle to impose their own policy preferences on nationwide classmembers in derogation of the rights of millions of individuals, and the prerogatives of many sister state legislatures and courts.

CONCLUSION

By granting this writ, the Court will be able to clarify the limitations of a single state court's power within the structure of Federalism, and will vindicate vital principles embodied by the Due Process Clause.

Respectfully submitted,

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TABLE OF CONTENTS
Appendix to Petition

Page

Order of
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Case No. 04-L-113,
entered May 20, 2005 ..... 1a

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IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS
Entered: May 20, 2005

JESSICA HALL, individually
and on behalf of others similarly situated,

Plaintiff,

Case No. 04-L-113

SPRINT SPECTRUM L.P. d/b/a SPRINT PCS GROUP and SPRINTCOM, INC. d/b/a SPRINT PCS GROUP,

Defendants.

ORDER

Plaintiff, Jessica Hall ("Plaintiff") on behalf of herself and all others similarly situated moves this Court in her Motion for Class Certification pursuant to the Illinois Code of Civil Procedure (735 ILCS 5/2-801, *et seq.)*. Having reviewed the record before the Court, including all briefs and other submissions of the parties, having heard argument and considered the evidence presented, and all parties having had an opportunity to present arguments, testimony and to raise issues, for the reasons that follow, the Motion of Plaintiff is granted.

BACKGROUND FACTS RELEVANT TO THE MOTION

Defendants Sprint Spectrum L.P. and SprintCom, Inc. both d/b/a Sprint PCS Group (collectively hereinafter, "Sprint" or "Defendants"), are in the business of providing wireless telecommunications services under the name "Sprint PCS." Sprint provides wireless communications services to millions of customers throughout the United States. Sprint is headquartered in Overland Park, Kansas, but operates and conducts its business throughout the United States, including within the State of Illinois. Plaintiff is a resident of Madison County, Illinois who entered into a term service agreement with Sprint; terminated her agreement early; and paid an Early Termination Fee ("ETF") to Sprint. It is the imposition by Sprint and the payment by Plaintiff of this Early Termination Fee that lies at the center of the controversy.

In this action, Plaintiff alleges that: (1) Sprint committed statutory consumer fraud by imposing an unconscionable penalty on Plaintiff and all members of the class who were charged and paid an ETF for terminating their service agreements before expiration; (2) Sprint's collection of unconscionable penalties was unlawful meriting restitution; (3) Sprint breached the term service agreements by charging an illegal penalty; and (4) Sprint was unjustly enriched by payments of the ETF. Sprint disagrees and argues the ETF is either an alternative means of performance or a legitimate liquidated damage provision rather than a penalty, and as such, is lawful.

The underlying facts of Plaintiff's claim and the legal issue in the case is whether the ETF contained within the term services agreements is a penalty, presumably therefore invalid and unenforceable; or alternative means of performance or a valid liquidated damages clause, and presumably therefore lawful and enforceable.

LEGAL STANDARD

For a suit to proceed as a class action in Illinois, a court must find that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members; (3) the representative parties will fairly and adequately protect the interests of the class; and (4) a class action is an appropriate method for the fair and efficient adjudication of the controversy. 735 ILCS 5/2-801.

The Court has carefully considered all arguments of counsel, and the briefs, pleadings, and exhibits submitted to the Court. The Court has assigned to Plaintiff the burden of satisfying the four requirements of 5/2-801. *Wheatley v. Board of Ed. Of District 205*, 99 Ill. 2d 481, 486 (1984). The Court has not reached any determinative conclusions regarding the underlying merits of the parties' claims other than to consider them in proper proportion at this early stage of the proceedings. *See Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 177 (1973); *Clark v. TAP Pharmaceutical Products, Inc.*, 343 Ill. App. 3d 538, 544-45 (5th Dist. 2003), *app. pending*. After full

consideration the Court has determined that the Plaintiff has met her burden under 735 ILCS 5/2-801 and finds that the statutory requisites for class certification are satisfied at this time. *See Purcell & Wardrope Chartered v. Hertz Corp.*, 175 Ill. App. 3d 1075 (1st Dist. 1988). In the exercise of its discretion, the Court concludes that the proposed class is hereby certified and retains jurisdiction to modify or amend this order as circumstances dictate.

DISCUSSION

(1) NUMEROSITY

The Plaintiff's complaint alleges thousands of members nationwide, and Sprint does not contest that the class is so numerous that the joinder of all members would be impractical. Accordingly, the first prerequisite of section 2-801 of the Code of Civil Procedure is met. 735 ILCS 5/2-801(1); *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320 (1977); *TAP Pharmaceutical,* 343 Ill. App. 3d at 545.

(2) COMMON QUESTIONS OF FACT OR LAW

The record currently before the Court is preliminary and subject to development and refinement as the parties proceed through discovery. Nothing in the foregoing is or should be considered as a finding by this Court on the merits of any factual or legal issues of the litigation other than what is necessary to the question of certification.

The record before the Court at this time indicates that Sprint employs uniform contracts and agreements in dealing with its customers. These, include the PCS Advantage Agreement (Exhibit B to the Complaint and hereinafter referred to as the "Term Service Plan" or "TSP") and the "Terms and Conditions of Service" (Exhibit A to the Complaint and hereinafter referred to as the "Terms and Conditions" or "TC") which are found in various locations such as the Sprint Website and published materials provided and available to Sprint customers. The Terms and Conditions are incorporated, by reference into the Term Service Plan and may be modified by Sprint without notice. The agreement between Sprint and its wireless customers is comprised of the Terms and Conditions and the Term Service Plan. The provisions contained within the TSP and the TC are not the subject of negotiation between Sprint and its customers but are form documents prepared by Sprint and applicable to all Sprint's wireless customers.

It appears that Plaintiff's claims arise from the provisions of these uniform documents, the alleged legal implications of those uniform provisions, and the alleged manner those uniform provisions have been allegedly applied by Sprint to its wireless customer base. This presents a core of common and predominant factual and legal questions the successful adjudication of which will establish a right of recovery, or resolve central issues on behalf of class members. *Society of St. Francis v. Dulman,* 424 NE 2d 59 (1981); and *Weiss v. Waterhouse*, 804 NE 2d 536 (2004).

It has been suggested to the Court by Sprint that there may be versions of these documents pre-dating Plaintiff's experience as a Sprint customer, however Sprint has not seen fit to place them before the Court at this time, and has not identified any material variance in the language of the prior iterations. In the event that some subclass need be created by virtue of contract language variation, the Court retains jurisdiction to make those determinations. Further discovery may refine the scope of the class or necessitate the creation of subclass(es). Nevertheless such issues are hypothetical at this stage of the proceedings.

In addition to using of uniform contracts, Sprint implements its ETF in a common way. The record indicates the following: (1) Sprint collects ETF's in every state where Sprint conducts business;[1] (2) Sprint charges $150 for early termination, regardless of how early or late the customer terminates, the amount of the charge does not vary among consumers; (3) Sprint does not prorate the ETF, unless apparently it is threatened with suit or agency referral; (4) Sprint allegedly did not attempt to estimate the amount of actual damage it might incur (if any) were a customer to cancel early; (5) Sprint allegedly is capable of calculating (with remarkable specificity) the actual alleged damages sustained in the event of early termination; (6) Payment of the ETF does not satisfy any outstanding obligations the customer owes to Sprint at the time of cancellation; (7) none of the operative documents state that the ETF is a

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[1] The record demonstrates that Sprint does not conduct business in Montana or Alaska.

"liquidated damage", therefore, the contention of Plaintiff is there could be no meeting of the minds that such was its intended purpose is accepted as argument; and (8) Plaintiff has presented Sprint documents that indicate that at least one purpose of the ETF policy was to prevent customers from canceling and is thereby both a threat to secure future performance and a penalty for having done so.

Sprint argues that individualized issues of fact predominate because the problem of proving, calculating and distributing damages to plaintiff's proposed class requires highly individualized inquiries that renders the task "Herculean." Sprint further contends that an "individualized inquiry dependent on myriad variables pertaining to each individual subscriber's particular usage and rate plan history" is necessary. While the Court does not here pass judgment on the merits of Sprint's defenses, but on the issue of certification only, the record presented by Sprint does not support the assertion that particularized issues predominate.

On the questions of proving, calculating, and distributing damages, Plaintiff's case could not be more straightforward. The purported unlawfully exacted "penalty" was $150 dollars from each class member. Sprint itself claims the ETF to be a "liquidated damage" and as such its proof and calculation is already known. Sprint's presentation to the Court indicates an ability to track payments by customer, as such it can determine which customers

paid the ETF, when they made payment, and the amount paid.

This Court finds that Sprint's assertions that each customer's individual wireless usage, the net profit or loss arising from that usage, and the actual damages realized from each cancellation, are not predominating individual issues sufficient to defeat certification. Sprint implemented a flat rate of $150 for the ETF. The core issue in the litigation is whether or not it had the right to do so, not whether any particular customer's "usage" made the relationship profitable or unprofitable for Sprint. The predominant issue framed at certification involves the ETF itself rather than any "actual damages" arising from early cancellation. The record indicates that Sprint uses standardized means and methods to impose and collect early termination fees and every class member has essentially the same claim against Sprint. This is a classic case for certification.

Class actions can provide an efficient means for resolving claims about wrongful practices perpetrated through uniform or standardized misconduct. "A class action can properly be prosecuted where a defendant is alleged to have acted wrongfully in the same basic manner as to the entire class." *Gordon*, 224 Ill. App. 3d at 200-01, *citing Brooks v. Midas-Int'l Corp.*, 47 Ill. App. 3d 266 (1st Dist. 1977). When at least one issue of fact or law is common to the class, and the issue predominates over questions affecting only individual members, subsection 2-801(2) is satisfied. 735 ILCS 5/2-801(2). *See Steinberg*

v. Chicago Medical School, 69 Ill. 2d 320$_5$ 338 (1977). "[C]ertification require[s] only that there be either a predominating common issue of law or fact, not both." *Martin v. Heinold Commodities, Inc.*, 117 Ill. 2d 38, 81 (1994).[2] A common issue may be shown when the class members are aggrieved by the same or similar conduct or by a standardized pattern of conduct. *Miner v. Gillette Co.*, 87 Ill. 2d 7; 19 (1981).

Sprint argues "nationwide consumer class actions are impossible to certify due to the wild divergence among the consumer protection statutes of the several states." The Court has conducted an extensive analysis of the varying state consumer protection laws and cannot find the "wild divergence" Sprint decries. In fact the Court has not found, nor has Sprint presented, any outcome determinative differences in the substantive laws reviewed. Nor has the Court found outcome determinative variations in the substantive law of contracts or unjust enrichment. The Restatements have taken root in the multi-state jurisdictions implicated in this litigation providing the requisite uniformity to merit certification. Indeed, all states are in accord regarding penalties. *Lawyers Title Ins. Co. v. Dearborn Title Corp.*, 118 F.3d 1157, 1160 (7th Cir. 1997) ("Illinois

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[2] *See also Gordon v. Boden*, 224 111. App. 3d 195, 200-01 (1st Dist. 1991) ("Section 2-801(2) of the class action statute is couched in the disjunctive 'common questions of fact or law.' It does not, therefore, require the presence of both a common question of fact and a common question of law. So long as there are questions of fact or law common to the class and these predominate over questions affecting individual members of such class, the statutory requisite is met").

like all other states does not enforce penalty clauses in contracts.")

However, Sprint's Terms and Conditions provide as follow: "This agreement is governed by and must be construed under ... the laws of the State of Kansas; without regard to choice of law principles." Sprint's choice of law provision makes debate over unmanageable divergence academic. "Where the parties to a contract have entered an agreement that incorporates a choice of law provision, Kansas courts generally effectuate the law chosen by the parties to control the agreement." *Brenner v. Oppenheimer & Co., Inc.*, 44 P.3d 364, 375 (Kan. 2002) (citing Restatement (Second) Conflict of Laws § 187). Illinois law is the same. "Generally, choice of law provisions will be honored." *Belleville Toyota v. Toyota Motors*, 199 Ill. 2d 325, 351 (Ill. 2002); *Hofeld v. Nationwide Life Ins. Co.*, 59 Ill. 2d 522, 528-29 (Ill. 1975) ("Generally, the law applicable to a contract is that which the parties intended....").

The Kansas Consumer Protection Act ("KCPA") precludes contractual penalties. "No supplier shall engage in any unconscionable act or practice in connection with a consumer transaction." Kan. Stat. Ann. § 50-627(a). The Kansas Supreme Court has held that a clause that exacts a penalty for termination of the contract is unconscionable, as a matter of law. *Wille v. Southwestern Bell Tel. Co.*, 219 Kan. 755, 758-59, 549 P.2d 903 (Kan. 1976) (unconscionability includes "the inclusion of penalty clauses."); *John Deere Leasing Co. v. Blubaugh*, 636 F. Supp. 1569, 1574 (D. Kan. 1986) ("The distinction between a liquidated damages clause and

one for penalty is that a penalty is to secure performance, while a liquidated damages provision is for payment of a sum in lieu of performance. [citation omitted] A penalty provision is unconscionable as a matter of law. [citation omitted]"). The KCPA also allows class actions for damages. *See* Kan. Stat. Ann. § 50-634 ("A consumer who suffers a loss as a result of a violation of this act may bring a class action for the damages caused by an act or practice: (1) violating any of the acts or practices specifically proscribed in K.S.A.... § 50-627....").

Plaintiff has shown that common questions of fact and law predominate, and this case is manageable and within the norm of cases certified in Illinois. Thus, in accordance with 735 ILCS 5/2-801(2), the Court finds there is predominance.

A single common question of fact can justify class certification. *Steinberg v. Chicago Medical School,* 69 Ill. 2d 320, 338 (1977). Such common questions typically predominate where, as here, a "defendant is alleged to have acted wrongfully in the same basic manner as to an entire class." *Gorden v. Boden*, 224 Ill. App. 3d 195, 200-01 (1st Dist. 1991). In such circumstances, the common class questions still predominate the case, and the class action is not defeated. *Brooks v. Midas-Int'l Corp.*, 47 Ill. App. 3d 266, 273 (1st Dist 1977).

(3) ADEQUACY OF REPRESENTATION

735 ILCS 5/2-801(3) conditions class certification upon a finding that "[t]he representative parties will fairly and adequately protect the interest of the class." "The purpose ... of the adequate representation requirement is merely to ensure that all class members will receive proper, efficient, and appropriate protection of their interests in the presentation of the claim." *Gordon*, 224 Ill. App. 3d at 203; *Avery*, 321 Ill. App. 3d at 285.

The Court concludes that Plaintiff has zealously pursued her claims against Sprint. Plaintiff has demonstrated her intent, ability, and adequacy to represent the entire class. The Court further finds that no conflicting interests exist between Plaintiff and the Plaintiff Class as it is clear from the Court's review of the material submitted in support of class certification that the representative herein and Class members share common objectives and legal and factual positions. The Court also has considered the quality and experience of the attorneys for the Class. The Court finds, after a rigorous analysis and review of the pleadings submitted by Plaintiffs' counsel and having observed their conduct in open court, that they are able advocates for the Class. Counsel for Plaintiff have regularly engaged in major complex litigation of the size, scope, and complexity similar to this case and have successfully prosecuted many and varied class actions or other complex litigation. The Court finds that counsel for Plaintiff are well suited for this case and that Plaintiff will fairly and adequately

protect the interest of the Class in compliance with the mandate of 735 ILCS 5/2-801(3).

(4) APPROPRIATE METHOD FOR THE FAIR AND EFFICIENT ADJUDICATION OF CONTROVERSY

735 ILCS 5/2-801(4) conditions class certification on a finding that "[t]he class action is an appropriate method for the fair and efficient adjudication of the controversy." In considering the fourth prerequisite, the Court has balanced whether a class action can best secure economies of time, effort, and expense, and promote uniformity of decision or accomplish other ends of equity and justice. *Gorden*, 224 Ill. App. 3d at 203. Where, as here, the first three statutory criteria are met this "manifest[s] that the final requirement of the statute... is fulfilled." *Steinberg*, 69 Ill.2d at 339.

Individual adjudication of the claim Plaintiff has brought would be manifestly unfair and inefficient.

In sum, individual lawsuits for small amounts would be too expensive, and absent a class action, individual lawsuits run a substantial likelihood of inconsistent adjudications. The Court concludes, pursuant to 735 ILCS 5/2-801(4), that a class action is an appropriate method for the fair and efficient adjudication of this controversy for all parties.

CONCLUSION

Pursuant to 735 ILCS 5/2-801, this Court concludes that Plaintiff has adequately satisfied the requirements for class certification of this action under Illinois law. The Court concludes that the proposed Class is manageable.

Plaintiffs will now have the opportunity to try and prove the merits of their claims, which is an entirely different matter from establishing the requirements for class certification. In sum, Plaintiff has shown that common issues predominate, this case is manageable and within the norm of cases certified in Illinois. The Court notes that if Sprint wins the common issues, then Sprint will have resolved this controversy in its favor against the entire class. Alternatively, if Plaintiff wins the point, then the issue will be resolved in favor of the class and support Plaintiffs claim that Sprint's Early Termination Fees are not valid liquidated damages, but rather illegal penalties. Either way, the benefits a class proceeding offers – consolidated proceedings and resolution of identical small claims – will be achieved.

The following described Plaintiff Class is hereby ordered certified for purposes of litigation and trial:

> All persons who were charged a Sprint Early Termination Fee because they canceled their cellular or wireless agreement before the end of its term.

Defendant and the members of the Illinois judiciary are excluded from the class.

The Court hereby appoints Plaintiff Jessica Hall as the representative class plaintiff and appoints The Lakin Law Firm, P.C. and Freed & Weiss, LLC, as co-lead class counsel and Diab & Bock additional class counsel.

The Court is always mindful of the fact that, should manageability issues arise that have not currently been manifested, this Court's order "may be amended before a decision on the merits." 735 ILCS 5/2-802.

ENTERED: May 20, 2005

/s/
Judge Nicholas Byron

NO. 5-05-0354
Entered: June 27, 2007

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

JESSICA HALL, Individually and on Behalf of Others Similarly Situtated,	) Appeal from) the Circuit) Court of
Plaintiff-Appellee,	) Madison) County.
v.	)
	) No. 04-L-113
SPRINT SPECTRUM L.P., d/b/a Sprint PCS Group, and SPRINTCOM, INC., d/b/a/ Sprint PCS Group	) Honorable) Nicholas G.) Byron) Judge,
Defendants-Appellants.	) presiding.

JUSTICE STEWART delivered the opinion of the court:

The defendants, Sprint Spectrum L.P. and SprintCom, Inc., both doing business as Sprint PCS Group (collectively referred to as Sprint), appeal, pursuant to Illinois Supreme Court Rule 306(a)(8) (210 Ill. 2d R. 306(a)(8)), from an order of the circuit court of Madison County certifying a 48-state class in a putative class action lawsuit filed by the plaintiff, Jessica Hall. We affirm.

BACKGROUND

Sprint provides wireless communications services to millions of customers throughout the United States. Sprint is headquartered in Overland Park, Kansas, but operates and conducts its business throughout the United States, including within the State of Illinois.

In June 2003, Hall, a resident of Madison County, Illinois, entered into a cell phone service contract with Sprint at a Radio Shack store in Granite City, Illinois. In doing so, she agreed to be bound to a one-year contract and to pay a $150 early termination fee if she did not remain a customer for a full year. Hall's account included two cell phone numbers.

In October 2003, Sprint discontinued Hall's service for nonpayment. Hall then called Sprint to cancel her contract, but Sprint refused to cancel her service unless she paid the remaining balance on her account plus the early termination fee. In December 2003, at the Sprint PCS store in Fairview Heights, Illinois, Hall paid, under protest, the entire amount ($415.61) Sprint claimed she owed on one of her two cell phone numbers, including the early termination fee. She also wanted to cancel her second cell phone number but could not afford to pay the early termination fee. Sprint refused to cancel the account and stop the accrual of charges unless Hall paid the early termination fee for the second cell phone number. She never paid the early termination fee for the second cell phone number, and ultimately, Sprint wrote off the second account for nonpayment.

On February 2, 2004, Hall filed her original class action complaint alleging four causes of action: (1) breach of contract, (2) statutory fraud, (3) unjust enrichment, and (4) relief from unlawful penalties. Each cause of action rested on the theory that early termination fees are unlawful penalties. Hall sought damages for all early termination fees Sprint had collected from consumers in the United States. Hall brought her original class action complaint under Illinois's Consumer Fraud and Deceptive Business Practices Act (Illinois Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2002)) for Illinois class members and, for non-Illinois class members, under the consumer protection statutes of their respective states.

With her class action complaint, Hall filed a motion for class certification, pursuant to section 2-801 of the Code of Civil Procedure (735 ILCS 5/2-801 (West 2002)). Following a hearing on February 18, 2005, the trial court entered a handwritten order, granting the motion and certifying a 48-state class action. In the order, the trial court directed the parties to submit a formal proposed order.

On March 23, 2005, Hall filed a first amended class action complaint, alleging five causes of action: (1) breach of contract (count I), (2) violation of the Kansas Consumer Protection Act (Kan. Stat. Ann. §50-623 *et seq.* (2005)) (count II), (3) statutory fraud under the Illinois Consumer Fraud Act and the consumer protection statutes of the other states where Sprint does business (count III), (4) unjust enrichment (count IV), and (5) relief from unlawful penalties (count V).

In her first amended complaint, Hall alleged that Sprint placed the following express choice-of-law provision in all of its contracts: "This Agreement is governed by and must be construed under federal law and the laws of the State of Kansas, without regard to choice [-] of [-] law principles."[3] Accordingly, unlike the original complaint, which largely depended upon the Illinois Consumer Fraud Act, the first amended complaint alleged that Kansas common law should be applied nationally (counts I, IV, and V) and the Kansas Consumer Protection Act should be applied nationally (count II) or that the Illinois Consumer Fraud Act should be applied to Illinois residents and the consumer fraud acts of the other 47 states should be applied to residents of those states (count III).

Also on March 23, 2005, Sprint filed a motion to reconsider the trial court's order granting Hall's motion for class certification. Following a hearing on April 5, 2005, the trial court denied Sprint's motion to reconsider.

On May 20, 2005, the trial court entered a formal, written order, certifying the following 48-state class: "All persons who were charged a Sprint Early Termination Fee because they canceled their cellular or wireless agreement before the end of its

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[3] In fact, many contracts entered into with defendant Sprint Spectrum L.P., the Missouri limited partnership, contained a similar choice-of-law provision stating that Missouri law would apply. While we base our discussion on the Kansas choice-of-law provision, our analysis would be the same regarding the Missouri choice-of-law provision.

term." The order contemplates the application of Kansas law based on the express choice-of-law provision contained in Sprint's form contract.

On June 17, 2005, Sprint filed a petition for leave to appeal to this court, pursuant to Illinois Supreme Court Rule 306(a)(8) (210 Ill. 2d R. 306(a)(8)), which was denied on September 14, 2005. On October 19, 2005, Sprint filed a petition for leave to appeal to the Illinois Supreme Court. On January 25, 2006, the Illinois Supreme Court denied Sprint's petition for leave to appeal but issued a supervisory order, ordering this court to grant Sprint's petition for leave to appeal in light of *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 835 N.E.2d 801 (2005). *Hall v. Sprint Spectrum L.P.*, 217 Ill. 2d 600, 840 N.E.2d 1232 (2006). On February 22, 2006, this court granted Sprint's petition for leave to appeal.

ANALYSIS

On appeal, Sprint first argues that if the trial court predicated the 48-state class certification upon the application of the Illinois Consumer Fraud Act, the order is erroneous because the Illinois Consumer Fraud Act may not be applied extraterritorially. Sprint also argues that if the trial court predicated the class certification upon the application of the differing statutory and common law standards of 48 states, the order is erroneous. We need not address either of these arguments because, despite Sprint's arguments to the contrary, it is clear from the trial court's order that the class certification was not predicated upon the application of the Illinois

Consumer Fraud Act or the differing statutory and common law standards of 48 states. Instead, the class certification was predicated upon the application of Kansas law based on the choice-of-law provision contained in Sprint's form contract.

Sprint next argues that if the 48-state class certification was predicated upon the application of the Kansas Consumer Protection Act, the order must be reversed for two reasons: (1) based on the language of the statute, the Kansas Consumer Protection Act, like the Illinois Consumer Fraud Act, cannot be applied extraterritorially and (2) the Kansas Consumer Protection Act cannot be applied to all class members because the choice-of-law provision does not govern noncontractual claims, such as statutory fraud. We disagree.

This is not a case like *Avery,* where the plaintiff sought extraterritorial application of a statute based on the terms of the statute. *See Avery,* 216 Ill. 2d at 188-89, 835 N.E.2d at 855. Instead, in this case, the trial court enforced a voluntary and broadly worded choice-of-law provision in an adhesion contract drafted by Sprint to determine the validity and legality of a provision within the same contract-the early termination fee provision.

Sprint's choice-of-law provision states that the agreement should be governed by the law of Kansas. The only issue in this case is the validity of the early termination fee, and by the parties' own choice, that issue is governed by Kansas law. The fact that Kansas law might not otherwise apply is irrelevant, because the parties chose to apply Kansas law.

"Ordinarily, Illinois follows the Restatement (Second) of Conflict of Laws (1971) in making choice-of-law decisions." *Morris B. Chapman & Associates, Ltd. v. Kitzman,* 193 Ill. 2d 560, 568, 739 N.E.2d 1263, 1269 (2000). "Section 187 of the Restatement applies when the parties, as here, have made an express choice of law in their contract." *Maher & Associates, Inc. v. Quality Cabinets,* 267 Ill. App. 3d 69, 76, 640 N.E.2d 1000, 1006 (1994). Section 187(2) of the Restatement (Second) of Conflict of Laws provides, in pertinent part:

> "(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied *** unless either
>
> > (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
> >
> > (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties." Restatement (Second) of Conflict of Laws § 187(2) (1971).

"The public policy of a State must be sought in its constitution, legislative enactments[,] and judicial

decisions." *Roanoke Agency, Inc.* v. *Edgar*, 101 Ill. 2d 315, 327, 461 N.E.2d 1365, 1371 (1984).

In the present case, there is no question that Kansas and Missouri have a "substantial relationship to the parties or the transaction," because defendant SprintCom, Inc., is a Kansas corporation with its principal place of business in Kansas and defendant Sprint Spectrum L.P. is a Missouri limited partnership. In addition, there is no argument here that the Illinois constitution or legislative enactments articulate a public policy against applying a foreign state's consumer protection laws or that Illinois has a "materially greater interest" in the litigation than Kansas or Missouri. Therefore, the trial court properly found that the express choice-of-law provision contained in Sprint's form contract governs the contract.

These principles apply with equal force to the interpretation of the contract at issue and to the validity of its provisions. See Restatement (Second) of Conflict of Laws § 187(2), Comment *e*, at 565 (1971) ("Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to be secured. Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of the

law, persons are free within broad limits to determine the nature of their contractual obligations").

Sprint argues that because the Kansas Consumer Protection Act does not purport to have any extraterritorial application, it cannot be applied to any transaction that occurred outside Kansas, notwithstanding the parties' express choice-of-law provision stating that Kansas law would apply. Sprint argues that the Kansas Consumer Protection Act applies only to a "consumer transaction" (see Kan. Stat. Ann. §§ 50-626(a), 50-627(a) (2005)), which is defined as "a sale, lease, assignment[,] or other disposition for value of property or services *within this state*" (emphasis added) (Kan. Stat. Ann. § 50-624(c) (2005)).

However, the issue is not the territorial application of the Kansas Consumer Protection Act but whether the parties chose to apply Kansas law to govern the validity of the provisions in their contract. The fact that Kansas law might not otherwise apply is irrelevant because the parties expressly agreed that Kansas law would apply. See *Davis v. Miller*, 269 Kan. 732, 739, 7 P.3d 1223, 1229 (2000) ("Despite the legislative intent and the clear language of the [act], parties can bind themselves to the provisions of an otherwise inapplicable act by incorporating choice[-] of [-] law provisions in an enforceable contract. As long as application of a statute or act is not contrary to public policy, a court will uphold application of an otherwise inapplicable statute or act"); *Bartlett Bank & Trust Co. v. McJunkins*, 147 Ill. App. 3d 52, 59, 497 N.E.2d 398,403 (1986) ("Even where the [Uniform Commercial] Code is otherwise

inapplicable, the parties may incorporate the Code into their agreement and that agreement will be given effect"). Therefore, the trial court properly found that the parties bound themselves to the provisions of the Kansas Consumer Protection Act by incorporating the express choice-of-law provision in their enforceable contract.

Sprint also argues that Hall's claims are "noncontractual" and, therefore, that the choice-of-law provision should not apply to them. Hall has alleged a variety of claims, including breach of contract and statutory fraud. Each of these claims is based on the theory that the early termination fee is an unlawful penalty. The principle that a contract penalty is illegal and unenforceable is, itself, fundamentally a creature of contract law. See Restatement (Second) of Contracts §356, Comment *a*, at 157 (1981) ("[T]he parties to a contract are not free to provide a penalty for its breach. The central objective behind the system of contract remedies is compensatory, not punitive. Punishment of a promisor for having broken his promise has no justification on either economic or other grounds and a term providing such a penalty is unenforceable on grounds of public policy"). Hall's various claims do not reflect differing sources of the law so much as alternative theories whereby she and the other class members can bring an action to enforce the same underlying legal principle that comes from contract law, not tort law.

Before *Avery,* Illinois courts traditionally held that where a contract contained an express choice-of-law provision, the consumer protection law of the

designated state would apply. See, *e.g.*, *Potomac Leasing Co. v. Chuck's Pub, Inc.*, 156 Ill. App. 3d 755, 757-60, 509 N.E.2d 751, 753-55 (1987) (where a choice-of-law provision in the parties' contract designated Michigan law, Michigan consumer protection law applied).

In Avery, the Illinois Supreme Court held, "[A] plaintiff may pursue a private cause of action under the Consumer Fraud Act if the circumstances that relate to the disputed transaction occur primarily and substantially in Illinois." *Avery,* 216 Ill. 2d at 187, 835 N.E.2d at 853-54. The court in *Avery* discussed *Martin v. Heinold Commodities, Inc.,* 117 Ill. 2d 67, 510 N.E.2d 840 (1987), wherein the Illinois Supreme Court allowed the certification of the claims of the plaintiff class under the Illinois Consumer Fraud Act even withrespectto the non-Illinois plaintiffs. *Avery,* 216 Ill. 2d at 188-89,835 N.E.2d at 854-55. Although the court in *Martin* held that the application of Illinois law to a multistate class was consistent with principles of due process, the court in *Avery* noted that *the Martin* court did not address the scope of the Illinois Consumer Fraud Act as a matter of statutory interpretation. *Avery,* 216 Ill. 2d at 188-89, 835 N.E.2d at 855. The *Avery* court did not overrule *Martin* but, instead, distinguished it as follows:

> "In *Martin* ***, this court specifically based its decision on the following facts:
>
> (1) the contracts containing the deceptive statements were all executed in Illinois; (2) the defendant's principal place of business was in

> Illinois; (3) *the contract contained express choice-of-law and forum-selection clauses specifying that any litigation would be conducted in Illinois under Illinois law;* (4) complaints regarding the defendant's performance were to be directed to its Chicago office; and (5) payments for the defendant's services were to be sent to its Chicago office. Given these circumstances, this court concluded that the [Illinois Consumer Fraud] Act could apply to the whole class." (Emphasis added.) *Avery,* 216 Ill. 2d at 189, 835 N.E.2d at 855.

The Avery court found that, unlike *Martin,* virtually no circumstances relating to the disputed claims and practices at issue occurred or existed in Illinois for those plaintiffs who were not Illinois residents. *Avery,* 216 Ill. 2d at 189, 835 N.E.2d at 855. Therefore, *the Avery* court concluded, "[T]he circuit court erred in certifying a nationwide class that included class members whose claims proceedings took place outside Illinois." *Avery,* 216 Ill. 2d at 190, 835 N.E.2d at 855. Because the court decided the propriety of the certification order on statutory interpretation grounds, it declined to consider whether the certification of the nationwide class was unconstitutional or violated express choice-of-law rules. *Avery,* 216 Ill. 2d at 190, 835 N.E.2d at 855.

In the present case, as in *Martin* and unlike in *Avery,* the parties' contract contained an express choice-of-law provision. Moreover, as this court recently stated in *Barbara's Sales, Inc. v. Intel Corp.,* 367 Ill. App. 3d 1013, 1021, 857 N.E.2d 717, 724

(2006), *appeal allowed,* 222 Ill. 2d 567, 861 N.E.2d 653 (2006), "*Avery* in no way breaks with choice-of-law precedent and does not change the choice-of-law analysis to be applied." Therefore, under the express choice-of-law provision contained in the parties' contract, Kansas law, including the Kansas Consumer Protection Act, is applicable. See *Potomac Leasing Co.*, 156 Ill. App. 3d at 757-60, 509 N.E.2d at 753-55.

Sprint next argues that applying the Kansas Consumer Protection Act to non-Kansas class members would violate their due process rights under *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985). We disagree.

In *Phillips Petroleum Co.,* the United States Supreme Court stated:

> "Kansas must have a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of Kansas law is not arbitrary or unfair.
>
> [Citation.] ***
>
> When considering fairness in this context, an important element is the expectation of the parties." *Phillips Petroleum Co.*, 472 U.S. at 821-22, 86 L. Ed. 2d at 648-49, 105 S. Ct. at 2979-80.

Because Sprint's form contract contained an express choice-of-law provision, the class members had

reason to anticipate that Kansas law would govern their consumer fraud claim. Accordingly, enforcing the express choice-of-law provision is consistent with fulfilling the expectations of the parties and is not arbitrary or unfair. See *Phillips Petroleum Co.*, 472 U.S. at 821-22, 86 L. Ed. 2d at 648-49, 105 S. Ct. at 2979-80. As long as the law chosen in the contract satisfies the "substantial relationship to the parties or the transaction" test, as it does in this case, enforcing it will not violate due process. See Restatement (Second) of Conflict of Laws § 187(2)(a) (1971).

Relying *upon Avery* and *Gridley v. State Farm Mutual Automobile Insurance Co.*, 117 Ill. 2d 158, 840 N.E.2d 269 (2005), Sprint also argues that Illinois does not have a sufficient interest in this case to proceed with a 48-state class action under the law of Kansas. However, neither *Avery* nor *Gridley* contains any such rule.

In *Gridley*, the court held that a Louisiana resident's claims brought in Illinois on behalf of a nationwide class should be dismissed on grounds of *forum non conveniens*. *Gridley*, 217 Ill. 2d at 171, 840 N.E.2d at 277-78. However, the *Gridley* court did not consider any class certification issues. *Gridley*, 217 Ill. 2d 158, 840 N.E.2d 269.

In *Avery*, the court held, "[A] plaintiff may pursue a private cause of action under the Consumer Fraud Act if the circumstances that relate to the disputed transaction occur primarily and substantially in Illinois." *Avery*, 216 Ill. 2d at 187, 835 N.E.2d at 853-54. However, *Avery* did not

establish an "interest" test for multistate class actions. *Avery,* 216 Ill. 2d at 190, 835 N.E.2d at 855.

Adopting such an "interest" test would be directly contrary to *Miner v. Gillette Co.*, 87 Ill. 2d 7, 10-16, 428 N.E.2d 478, 480-83 (1981). In *Miner,* an Illinois plaintiff filed a class action complaint in Illinois on behalf of a nationwide class of consumers against the defendant, Gillette Company, in connection with the defendant's promotion of its "cricket" disposable butane lighters. *Miner,* 87 Ill. 2d at 10, 428 N.E.2d at 480. The Illinois Supreme Court allowed the Illinois plaintiff to maintain a nationwide class action in Illinois even though the defendant was a Delaware corporation with its headquarters in Massachusetts; the responses to the ad in question were directed to Minnesota; no aspect of the promotion took place in Illinois regarding non-Illinois residents; the unfulfilled requests came from persons in every state of the United States, the District of Columbia, Puerto Rico, and Canada; and only 12,000 of the 180,000 unfulfilled requests came from persons in Illinois. *Miner,* 87 Ill. 2d at 21-22, 428 N.E.2d at 485-86 (Ryan, J., dissenting). We will not presume that *Miner* has been overruled, absent a clear statement to that effect by the Illinois Supreme Court, and nothing in *Avery* or *Gridley* amounts to that clear statement. Accordingly, we find this argument to be without merit.

Finally, Sprint argues that the trial court abused its discretion in certifying the class because class certification is barred by a lack of commonality, intraclass conflicts, and an inadequacy of representation. "Class certification is governed by

section 2-801 of the Code of Civil Procedure (735 ILCS 5/2-801 (West 1998)), which is patterned after Rule 23 of the Federal Rules of Civil Procedure." *Avery,* 216 Ill. 2d at 125, 835 N.E.2d at 819. "Under section 2-801, a class may be certified only if the proponent establishes the four prerequisites set forth in the statute: (1) numerosity ('[t]he class is so numerous that joinder of all members is impracticable'); (2) commonality ('[t]here are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members'); (3) adequacy of representation ('[t]he representative parties will fairly and adequately protect the interest of the class'); and (4) appropriateness ('[t]he class action is an appropriate method for the fair and efficient adjudication of the controversy'). 735 ILCS 5/2-801 (West 1998)." *Avery,* 216 Ill. 2d at 125, 835 N.E.2d at 819.

"Decisions regarding class certification are within the sound discretion of the trial court and should be overturned only where the court clearly abused its discretion or applied impermissible legal criteria." *Avery,* 216 Ill. 2d at 125-26, 835 N.E.2d at 819. "However, '[a] trial court's discretion in deciding whether to certify a class action is not unlimited and is bounded by and must be exercised within the framework of the civil procedure rule governing class actions.'" *Avery,* 216 Ill. 2d at 126, 835 N.E.2d at 820 (quoting 4 A. Conte & H. Newberg, Newberg on Class Actions §13:62, at 475 (4th ed. 2002)).

As to the numerosity requirement, Sprint does not dispute that the class is so numerous that the joinder of all members would be impracticable.

Accordingly, the first prerequisite for class certification is met. See 735 ILCS 5/2-801(1) (West 2002).

"In order to satisfy the second requirement of section 2-801 (a common question of fact or law predominates over other questions affecting only individual class members), it must be shown that 'successful adjudication of the purported class representatives' individual claims will establish a right of recovery in other class members.'" *Avery,* 216 Ill. 2d at 128, 835 N.E.2d at 821 (quoting *Goetz v. Village of Hoffman Estates,* 62 Ill. App. 3d 233, 236, 378 N.E.2d 1276, 1279 (1978)). "So long as there are questions of fact or law common to the class and these predominate over questions affecting only individual members of such class, the statutory requisite is met." *Steinberg v. Chicago Medical School,* 69 Ill. 2d 320, 338, 371 N.E.2d 634, 643 (1977). " 'A common question may be shown when the claims of the individual class members are based upon the common application of a statute or when the members are aggrieved by the same or similar conduct [citation] or a pattern of conduct [citations].'" *Clark v. TAP Pharmaceutical Products, Inc.,* 343 111. App. 3d 538, 548, 798 N.E.2d 123, 131 (2003) (quoting *Avery v. State Farm Mutual Automobile Insurance Co.,* 321 Ill. App. 3d 269, 280, 746 N.E.2d 1242, 1252-53 (2001), *affd in part & rev'd in part,* 216 Ill. 2d 100, 835 N.E.2d 801 (2005)). "A class action can properly be prosecuted where the defendants allegedly acted wrongfully in the same basic manner as to an entire class, and in such circumstances, the common class questions predominate the case, and the class action

is not defeated." *Clark,* 343 111. App. 3d at 548, 798 N.E.2d at 131.

" ' "[A] class action will not be defeated solely because of some factual variations among class members' grievances."" *Clark,* 343 Ill. App. 3d at 548, 798 N.E.2d at 131 (quoting *Heastie* v. *Community Bank of Greater Peoria,* 125 F.R.D. 669, 675 (N.D. Ill. 1989) (quoting *Patterson* v. *General Motors Corp.,* 631 F.2d 476, 481 (7th Cir. 1980))). That some members of a class are not entitled to relief will not bar the class action. *Steinberg,* 69 Ill. 2d at 338, 371 N.E.2d at 643. After the litigation of common questions, questions that are peculiar to individual class members may be determined in ancillary proceedings. *Clark,* 343 Ill. App. 3d at 548, 798 N.E.2d at 131.

"Individual questions of injury and damages do not defeat class certification." *Clark,* 343 Ill. App. 3d at 549, 798 N.E.2d at 132. The fact that the class members' recoveries may be in different amounts, which must be determined separately, does not necessarily mean that the common questions do not predominate. *Clark,* 343 Ill. App. 3d at 549, 798 N.E.2d at 132. If individual damage determinations are required, the court can utilize various procedures to determine damages, including creating subclasses. *Clark,* 343 Ill. App. 3d at 549, 798 N.E.2d at 132.

In the present case, the record reveals that the common question is whether Sprint's early termination fee is an illegal penalty. If the early termination fee is an illegal penalty, then Sprint has

no right to charge or collect it and should pay it back. Sprint concedes that it charges the same $150 early termination fee to every customer who terminates service before the end of the term, regardless of when during the term the customer cancels.

Sprint allegedly acted wrongfully in the same basic manner toward the entire class-by charging an early termination fee that was an illegal penalty. Accordingly, there are common questions of law or fact that predominate over any questions affecting only individual members. See 735 ILCS 5/2-801(2) (West 2002); *Clark,* 343 Ill. App. 3d at 548, 798 N.E.2d at 131.

Turning to the adequacy-of-representation requirement, Sprint argues that Hall cannot adequately represent the interests of the absent class members because her pursuit of class claims will expose absent class members to potential judgments. According to Sprint, Hall's interest in pursuing her claims on behalf of a class conflicts with the interests of class members who do not want to be exposed to litigation as a result of her actions.

" 'The purpose of the adequate representation requirement is merely to ensure that all class members will receive proper, efficient, and appropriate protection of their interests in the presentation of the claim.' " *Clark,* 343 Ill. App. 3d at 550, 798 N.E.2d at 133 (quoting *Gordon v. Boden,* 224 Ill. App. 3d 195, 203, 586 N.E.2d 461, 466 (1991)).

> "The test applied to determine adequacy of representation is whether the

> interests of those who are parties are the same as those who are not joined and whether the litigating parties fairly represent those not joined. [Citation.] The attorney for the representative party 'must be qualified, experienced[,] and generally able to conduct the proposed litigation.' [Citation.] Additionally, [the representative party's] interest must not appear collusive." *Miner,* 87 Ill. 2d at 14, 428 N.E.2d at 482.

In the present case, Hall will fairly and adequately protect the interests of the class. See 735 ILCS 5/2-801(3) (West 2002). Hall's interest does not appear collusive, and it is apparent that her interests are the same as those of the absent class members-to recover the $150 early termination fee paid to Sprint, which Ill. 2d at 14, 428 N.E.2d at 482. In addition, the record amply demonstrates Hall's desire and ability to prosecute the claim vigorously on behalf of herself and the other class members, and no issue has been raised with respect to the qualifications, experience, and ability of Hall's counsel. *Set Miner,* 87 Ill. 2d at 14, 428 N.E.2d at 482.

Sprint's argument that class litigation will expose class members to potential judgments as a result of Hall's actions is partly belied by the fact that class members are potentially liable for judgments as a result of their breaches of their contracts and not primarily because of Hall's actions. See *Walczak* v. *Onyx Acceptance Corp.,* 365 Ill. App. 3d 664, 679, 850 N.E.2d 357, 371 (2006). Hall's claims are not antagonistic to the class because she is in the same position as all putative class members-

they all terminated their cell phone contracts before the end of their terms and paid the $150 early termination fee. See *Walczak,* 365 Ill. App. 3d at 679, 850 N.E.2d at 371. "[Generally, individual counterclaims or defenses do not render a case unsuitable for,class action." *Walczak,* 365 Ill. App. 3d at 679, 850 N.E.2d at 371. Even if Sprint pursues such claims only against individuals who join in the class action, the trial court's finding would not be unreasonable because class members have the right to opt out of the class action lawsuit. See *Walczak,* 365 Ill. App. 3d at 679, 850 N.E.2d at 371; see also 735 ILCS 5/2-804 (West 2002) (addressing the exclusion of class members).

We turn then to the issue of whether a class action is an appropriate method for fairly and efficiently adjudicating the controversy. In deciding this issue, a court should consider whether "the class action (1) can best secure the economies of time, effort, and expense and promote a uniformity of decision or (2) can accomplish the other ends of equity and justice that class actions seek to obtain." *Clark,* 343 Ill. App. 3d at 552, 798 N.E.2d at 134.

In the present case, a class action is an appropriate method for fairly and efficiently adjudicating the controversy. See 735 ILCS 5/2-801(4) (West 2002). Initially, we note that our holding that the first three prerequisites of section 2-801 have been established makes it evident that the fourth requirement has been fulfilled as well. See *Clark,* 343 Ill. App. 3d at 552, 798 N.E.2d at 134. In addition, this is a consumer class action, which is "often the last barricade of consumer protection" *(Clark,* 343 Ill.

App. 3d at 552, 798 N.E.2d at 134). Because a consumer class action provides restitution to the injured and deterrence to the wrongdoer, the ends of equity and justice are accomplished. See *Clark,* 343 Ill. App. 3d at 552, 798 N.E.2d at 134. Furthermore, because there are numerous class members and common questions, a class action serves the economies of time, effort, and expense and prevents possible inconsistent results. See *Clark,* 343 Ill. App. 3d at 552,798 N.E.2d at 134. In this case, litigating the individual lawsuits would be a waste of judicial resources, and addressing the common issues in one class action would aid judicial administration. See *Clark,* 343 Ill. App. 3d at 552, 798 N.E.2d at 134.

CONCLUSION

For the foregoing reasons, the order of the circuit court of Madison County certifying a 48-state class is affirmed.

Affirmed.

CHAPMAN and DONOVAN, JJ., concur.

Entered: August 8, 2007
NO. 5-05-0354

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

JESSICA HALL, individually and on behalf of others similarly situtated,	)	Appeal from the Circuit Court of Madison County.
Plaintiff-Appellee,	)	
v.	)	No. 04-L-113
SPRINT SPECTRUM L.P., d/b/a SPRINT PCS GROUP, et al.,	)	
Defendants-Appellants.	)	

ORDER

This cause has been considered on petition for rehearing or, in the alternative, for a Supreme Court Rule 316 certificate of importance of defendants-appellants, Spring Spectrum L.P., and SpringCom, Inc.; and the court being advised in the premises;

IT IS THEREFORE ORDERED that the petition for rehearing or, in the alternatuve, for a Supreme Court Rule 316 certificate of importance shall be, and the same hereby is, denied in its entirety.

105309 Entered: February 4, 2008

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

January 30, 2008

Mr. Steven A. Levy
Goldberg, Kohn, Bell, Black, Rosenbloom & Moritz
55 E. Monroe St., Suite 3300
Chicago, IL 60603

No. 105309 – Jessica Hall, Indv., etc., respondent, v. Sprint Sprectrum L.P., etc., et al., petitioners. Leave to appeal. Appellant Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on March 6, 2008.

Supreme Court of Illinois
SUPREME COURT BUILDING
SPRINGFIELD 62701
Entered: February 28, 2008

February 25, 2008

JULEANN HORNYAK
CLERK OF THE COURT
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In re: Jessica Hall, Indv., etc., respondent, v. Sprint Spectrum L.P., etc., et al., petitioners. No. 105309

Today the following order was entered in the captioned case:

> Motion by petitioner for leave to file a motion to reconsider denial of petition for leave to appeal and alternate request for the issuance of a supervisory order in light of Barbara's Sales v. Intel, Avery v. State Farm, Gridley v. State Farm and Smith v. Illinois Central Railroad. Motion Denied.
>
> Order entered by the Court.

Very truly yours,

/s/

Juleann Hornyak
Clerk of the Supreme Court

cc: All Counsel of Record